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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

STANLEY E. REED,

Petitioner,

v.

CHEVRON PIPE LINE COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John E. Gunter
110 West Louisiana
Suite 100
Midland, Texas 79701
(915) 687-3137

Attorney for Petitioner

37 pp

QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS VIOLATE THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY REVERSING THE JUDGMENT ENTERED IN THE DISTRICT COURT UPON A JURY VERDICT FINDING LIABILITY ON THE BASIS THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT WHERE THE DISTRICT COURT HAD REJECTED RESPONDENT'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW AND SUPREME COURT PRECEDENT ESTABLISHES THAT THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE PRECLUDES AN APPELLATE COURT FROM REVERSING A JUDGMENT ON THE BASIS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT UNDERLYING THE JUDGMENT?

2. ASSUMING REVIEW FOR SUFFICIENCY OF THE EVIDENCE IS CONSTITUTIONAL, DID THE COURT OF APPEALS APPLY AN IMPROPER STANDARD IN DETERMINING THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE WHEN THE COURT OF APPEALS SHOULD ONLY HAVE REVIEWED THE DISTRICT COURT'S DENIAL OF THE POST-VERDICT MOTIONS FOR ABUSE OF DISCRETION?

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LIST OF PARTIES

STANLEY E. REED, Petitioner

CHEVRON PIPELINE COMPANY, Respondent

Counsel for Petitioner,
STANLEY E. REED

John E. Gunter
110 West Louisiana, Suite 100
Midland, Texas 79701

Counsel for Respondent,
CHEVRON PIPELINE COMPANY

James C. Winton
Lisa H. Pennington
Lilly E. Thrower
Baker & Hostetler
1000 Louisiana, 20th Floor
Houston, Texas 77002-5009

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CITATIONS AND REPORTS OF OPINIONS AND ORDERS

Chevron Pipeline Company v. Stanley E. Reed (No. 95-50409 Summary Calendar) Opinion dated April 8, 1996 (5th Cir.) unpublished opinion. Petition for Rehearing denied May 14, 1996. (See Appendix A & B)

STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The opinion of the Fifth Circuit Court of Appeals to be reviewed was dated April 8, 1996 and the Petitioner's Motion for Rehearing was denied by the Fifth Circuit Court of Appeals on May 14, 1996.

THE CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the United States Constitution states as follows:

"In suits at common law, where the value and controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

At issue in this case is the second clause of the Seventh Amendment, which forbids a federal court from "reexamining" any fact tried by a jury except other than according to the common law. The Court of Appeals Judgment in this case certainly "reexamined" a fact tried by a jury because the sole basis for its decision to reverse the judgment entered in the District Court was that the evidence was insufficient to support the jury's verdict and the judgment

entered thereon. No question of law formed the basis of the Court of Appeal's decision; nothing in that decision indicates that the jury was not correctly charged on the law applicable to the Petitioner's claim and the evidence in the case, nor did the Respondent raise the insufficiency of the instruction in its appeal from the District Court.

STATEMENT OF CASE

The Petitioner, Stanley E. Reed, brought a diversity action under 28 U.S.C. §1332 in the United States District Court for the Western District of Texas against the Respondent, Chevron Pipe Line Co., asserting, inter alia, a claim under Texas law for compelled self-publication defamation arising from the Petitioner's termination from employment with the Respondent. A trial was held before a jury, and at the close of the Petitioner's evidence the Respondent made a motion for judgment as a matter of law which was denied by the District Court. Respondent made a similar motion at the close of all the evidence, which was again denied by the District Court. Thereafter, the jury returned a verdict for the Petitioner on his claim for compelled self-publication defamation and

awarded him damages of approximately $1 million. Respondent again moved for judgment as a matter of law after the jury returned its verdict, which motion was again denied by the District Court. Respondent sought postjudgment relief on the basis that the evidence was insufficient to support the verdict, but the District Court denied such relief and judgment was entered on the jury's verdict.

Respondent appealed to the Court of Appeals for the Fifth Circuit asserting, inter alia, that the evidence was insufficient to sustain the jury's verdict, although the Respondent did not challenge the adequacy of the instructions given the jury. The Fifth Circuit panel, who looked only at the cold record and briefs, agreed, on April 8, 1996 reversed the judgment, rendered

judgment in favor of the Respondent, and reversed an award of attorney's fees to the Petitioner. In its decision, the Fifth Circuit panel stated that it was reviewing the verdict for sufficiency of evidence and noted that a mere scintilla of evidence is insufficient to present a jury question and that there must be a conflict in substantial evidence to create a jury question. After assuming that a cause of action for compelled self-publication defamation exists under Texas law, the panel held that a qualified privilege protected the Respondent in this case, requiring the Petitioner prove by clear and convincing evidence that the Respondent acted with actual malice. It stated that the Petitioner offered no direct evidence of the state of mind of any of the Respondent's employee's responsible for

the termination of the Petitioner, and so held that the Petitioner failed to carry his burden of proving actual malice by clear and convincing evidence.

Petitioner petitioned for rehearing on the ground that the circumstantial evidence in the case was sufficient to support the jury's determination that the Respondent had acted with actual malice. Petitioner argued that the credibility of the witnesses was solely for the jury (and the trial judge) and that they were entitled to disbelieve Respondent's witnesses and their testimony concerning their reasons for terminating the Petitioner. The Trial Judge obviously agreed with the jury. On May 14, 1996, the Fifth Circuit filed a per curiam order denying the Petitioner's petition for rehearing.

ARGUMENT

I. The 5th Circuit Court of Appeals violated the Seventh Amendment's reexamination clause by reversing the Trial Court's judgment on the basis that the evidence is insufficient to support the jury verdict underlying the judgment.

This Court has never held that a Court of Appeals may, consistent with the Seventh Amendment, review a judgment entered in a Trial Court on the basis that the evidence supporting a verdict determining liability on which the judgment was entered was insufficient to support the verdict and judgment. [1]

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[1]The seventh amendment issue in this case is not controlled by this Court's decision last term in Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. (BNA) 4607 (June 24, 1996). The holding in that case was only that a New York statute controlling compensation awards for excessiveness could be given effect in an action tried in federal court under diversity jurisdiction, without offending

Indeed, this Court's precedent is expressly to the contrary. In United States v. Laub, 12 Pet. (37 U.S.) 1, 5 (1838), this Court stated that it is "a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error." That this rule is grounded in the reexamination clause of the seventh

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the seventh amendment, if the review standard set forth in that law is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for abuse of discretion. 64 U.S.L.W. (BNA) at 4608.

amendment is confirmed by the decision in Parsons v. Bedford, 3 Pet. (28 U.S.) 433, 447-49 (1830), where a claim of error in a district court's refusal to allow transcription of testimony was rejected largely on the basis of the seventh amendment:

> This is a prohibition to the Courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate Court, for some error of law which intervened in the proceedings.
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> * * *
>
> [I]f the evidence were now before us, it would not be competent for this Court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed.

See also Metropolitan Rail v. Moore, 121 U.S. 558, 573 (1887) (practice of reviewing trial court denial of a motion for a new trial based upon insufficiency of the evidence is perhaps forbidden in the appellate courts of the United States by the reexamination clause of the seventh amendment).

This application of the seventh amendment is not a 19th-century anachronism, but has been applied by this Court in more recent decisions. Thus, in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1932), this Court stated that the rule that this Court will not review the action of a federal trial court in denying a motion for a new trial for error of fact rests upon the reexamination clause of the seventh amendment and has been settled by a long and unbroken line of decisions.

It also noted that the rule "precludes likewise a review of such action by a Circuit Court of Appeals." Id. at 481 (footnote omitted). And in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247 (1940), the Court held that the case fell "within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact," citing the Fairmount Glass Works case. "Certainly," this Court went on to state, "denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 248.

Despite this clear precedent emanating from this Court, the Court of Appeals below engaged in precisely the kind of review prohibited by this precedent and the seventh amendment's reexamination clause. Despite the jury's finding that the Respondent was liable on the compelled self-defamation claim, the fact that the instructions upon which this verdict was rendered were not challenged, and the fact that the District Court repeatedly rejected the Respondent's motions for judgment and a new trial based upon the insufficiency of the evidence, the Court of Appeals reexamined the cold record before it and determined that the conclusions of the jury and the District Court were not correct. "Trial judges have the 'unique opportunity to consider the evidence in

the living courtroom context,' Taylor v. Washington Terminal Co., 409 F.2d 145, 148 (D.C. Cir. 1969), while appellate judges see only the 'cold paper record,' [Gasperini v. Center for Humanities, Inc.,] 66 F.3d [427], at 431 [(2d Cir. 1995)]." Gasperini v. Center for Humanities, Inc., supra, 64 U.S.L.W. (BNA) at 4613. The cases of this Court simply do not support the Court of Appeals' action in reversing a factual finding made by the jury and upheld upon motions for judgment and a new trial that the Respondent was liable to the Petitioner on his compelled self-defamation claim.

Such review cannot be approved on the basis that it does not constitute a reexamination of a "fact tried by a jury" within the meaning of the seventh

amendment. While it has been suggested that a federal court is reviewing a question of law in considering whether the trial court abused its discretion in denying a new trial, one commentator has stated that this argument is "purely verbal." C.A. Wright, "The Doubtful Ominiscience of Appellate Courts," 41 Minn. L. Rev. 751, 761 (1957). Thus,

> [i]f a jury finds defendant negligent, and the appellate court decides that the clear weight of the evidence shows him free from negligence, it is re-examining the jury's determination of a fact issue. Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.

Id. at 761.

Nor can review of the kind engaged in in this case be upheld on the basis that it conforms with "the rules of common law" within the meaning of the seventh amendment. While it is true that English courts did grant new trials on the ground that a verdict was contrary to the evidence, "the common law system was one in which the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified, and even then, only if he could persuade his brothers at Westminster to this view." Id. at 763. Thus, the procedure at common law required that the trial judge in the first instance find the verdict unsupported by the evidence. Furthermore, the English court which could reverse a verdict was in substance the same court which tried the action

before a jury, and so cannot be deemed an appellate court reviewing a verdict for the sufficiency of supporting evidence. Gasperini v. Center for Humanities, Inc., supra, 64 U.S.L.W. (BNA) at 4619 (Scalia, J., dissenting).

Although review of verdicts by courts of appeal for sufficiency of evidence has become common in some federal circuits, this practice by no means translates into constitutionality. Indeed, some courts of appeal have questioned whether they may, consistent with the seventh amendment, review verdicts based on the sufficiency of evidence. See Dunlap-McCuller v. The Riese Organization, 980 F.2d 153, 157 (2d Cir. 1992), cert. denied, 114 S. Ct. 290 (1993) (appellate review of jury verdict and denial of motion for new trial based upon insufficiency of evidence is inconsistent with the seventh amendment);

Green v. American Airlines, Inc., 804 F.2d 453, 455 (8th Cir. 1986) (same). In any event, even "a longstanding, widespread practice is not immune from constitutional scrutiny." Payton v. New York, 445 U.S. 573, 600 (1980). This practice and the action of the Court of Appeals in this case violates the restriction on reexamination plainly set forth in the seventh amendment, and the judgment below should be reversed on this basis.

II. Assuming Review For Sufficiency Of The Evidence Is Constitutional, Did The Court Of Appeals Apply A Proper Standard In Determining The Sufficiency Of The Evidence In This Case?

Even if review of a verdict based upon sufficiency of the evidence is allowed by the seventh amendment, the Court of Appeals' judgment in this case should be reversed because it applied an

improper standard for determining the sufficiency of the evidence. As discussed above, this Court has never countenanced review of jury verdicts on liability based upon the sufficiency of the evidence, and so has not had the occasion to establish the applicable standard of review. The various courts of appeal which have embraced such review have used a variety of standards for determining whether a verdict is not supported by sufficient evidence. See, e.g., Dutton v. Wolpoff & Abrahamson, 5 F.3d 649, 653 (3d Cir. 1993) (verdict can be overturned if record fails to contain minimum quantum of evidence from which jury could have rationally reached a verdict); Calusinski v. Kruger, 24 F.3d 931, 936 (7th Cir. 1994) (a verdict will not be overturned if it has a reasonable basis in the record). In the instant

case, the Court of Appeals held that the standard under which "'a mere scintilla of evidence is insufficient to present a question for the jury,'" and "'there must be a conflict in substantial evidence to create a jury question'" (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969)).

It is submitted that this standard gives insufficient deference to the verdict of a jury and the decision of a district court not to disturb that verdict on a motion for judgment as a matter of law or a new trial, especially in light of the concerns raised by the seventh amendment. In Gasperini v. Center for Humanities, Inc., supra, this Court held that a New York statute requiring review of damage awards made by juries must be applied in federal courts trying actions under diversity jurisdiction, but held that such review

should not be made in the first instance by the court of appeals. This Court held that review by the district court in the first instance was required by the "characteristics of the federal-court system" concerning the proper role of trial and appellate courts. Specifically, "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility" for application of the New York statute because trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold record. 64 U.S.L.W. (BNA) at 4613. Thus, this Court ordered that the district court must first determine whether the jury's damage award was improper as excessive, with the court of

appeals reviewing the district court's decision for "abuse of discretion." Id. at 4613-14.

Gasperini thus indicates that factual findings made by a jury and reviewed by the district court on postverdict motions should be reviewed under an "abuse of discretion" standard on appeal, given the characteristics of the federal court system as informed by the seventh amendment's reexamination clause. Such review is very narrow and has been defined as follows:

> "Abuse of discretion" is one of the most deferential standards of review; it recognizes that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decision than is an appellate court, which must work from a cold record.

In re Bolar Pharmaceutical Co., Securities Litigation, 966 F.2d 731, 732 (2d Cir. 1992). Abuse of discretion

occurs only where no reasonable person could take the view adopted by the trial judge, who must be accorded great deference in light of his or her first-hand exposure to the evidence and familiarity with the course of the trial. United States v. Hughes, 970 F.2d 227, 232-33 (7th Cir. 1992). In the context of reviewing administrative determinations, an abuse of discretion may be found only if there is no evidence to support the decision. Jaimez-Revolla v. Bell, 598 F.2d 243, 246 (D.C. 1979).

The review engaged in by the Court of Appeals in this case was certainly less deferent than that required under an abuse-of-discretion standard. The court below did not review on a "no evidence" standard, but held that a mere scintilla of evidence was not enough. In fact, the court's reference to the requirement that

there be a "conflict in substantial evidence" indicates that the court below required substantial evidence to support the verdict and the denial of the postverdict motions. Furthermore, the court never mentioned the deference which must be accorded to the trial court's decision not to grant a judgment as a matter of law or a new trial to the Respondent in light of the trial court's familiarity with the course of proceedings at trial. The Court of Appeals plainly applied a standard of review which was insufficiently deferent to the jury verdict and the District Court's decision not to overturn that verdict.

The error committed by the Court of Appeals in reviewing the sufficiency of the evidence certainly was harmful to the Petitioner because there was evidence supporting the jury's verdict and

supporting the view that the District Court's denial of the Respondent's post-trial motions was not an abuse of discretion. The Court of Appeals' decision rested largely on the ground that the Petitioner offered no "direct evidence on the state of mind" of any of the individuals involved in the decision to terminate the Petitioner, and so the Petitioner failed to prove that these individuals acted with actual malice, i.e., reckless disregard as to the truth or falsity of the allegations which formed the basis of the Petitioner's termination, in deciding to terminate the Petitioner. However, the Court of Appeals also recognized that the Petitioner presented evidence that his firing was a pretext for age discrimination and that the jury could have chosen to disbelieve the testimony

of the Respondent's witnesses that they believed the allegations of misconduct made against the Petitioner.

That the evidence presented to the jury was sufficient to allow it to find that there was actual malice in this case is supported by this Court's decision in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), a case involving a claim under the federal employment discrimination laws. The key issue in the case was whether the evidence was sufficient to prove that the employer had engaged in intentional discrimination on the basis of the employee's race. This Court held that so long as an employer satisfies its burden of producing evidence of a nondiscriminatory reason for the adverse action, any presumption of discrimination upon proof of a prima facie case of discrimination drops out of the picture, and then held as follows:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required[.]"

Id. at 2749 (emphasis in original; footnote omitted; citation omitted).

Hicks thus recognizes that a jury's decision to disbelieve a witness as to their state of mind or intent will suffice to permit it to infer the ultimate fact of intent. In this case, the jury could have disbelieved the Respondent's witnesses concerning their belief in the truth in the accusations against the Petitioner and their

disclaimer of any intent to terminate the Petitioner on the basis of his age. The jury was permitted to believe that the Respondent's witnesses were lying and that they, in fact, knew the allegations against the Petitioner were false or acted in reckless disregard as to their truth or falsity. The jury's disbelief of the Respondent's witnesses allowed the jury to infer intent, i.e., malice, and, contrary to the Court of Appeals' holding, no additional proof on this fact was required. Id.

This, combined with the other evidence of record, shows that the jury's verdict was supported by sufficient evidence and that the District Court did not abuse its discretion in upholding that verdict on postverdict motions by the Respondent. The searching review standard applied by the Court of Appeals

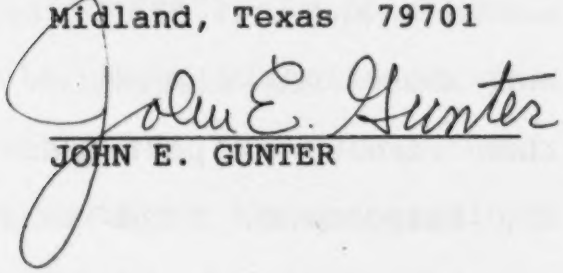
was simply inconsistent with the deference that is constitutionally required to be given jury verdicts and trial court decisions. Therefore, the Court of Appeals' judgment must be reversed.

CONCLUSION

For all of the foregoing reasons, the Petitioner, STANLEY E. REED, asks this Court to grant his Petition for Writ of Certiorari to the Fifth Circuit United States Court of Appeals.

Respectfully submitted,

LAW OFFICE OF
JOHN E. GUNTER
110 West Louisiana
Suite 100
Midland, Texas 79701

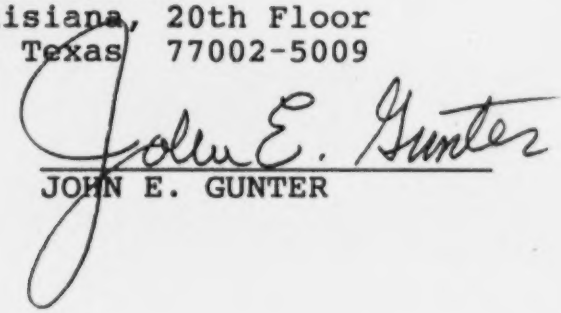


JOHN E. GUNTER

CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the Petition for Writ of Certiorari and Appendix was mailed on the 6th day of August, 1996, to the following attorneys of record:

James C. Winton
Lisa H. Pennington
Lilly E. Thrower
Baker & Hostetler
1000 Louisiana, 20th Floor
Houston, Texas 77002-5009



JOHN E. GUNTER